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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 171

MARY BELL KING, *Petitioner,*

vs.

THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT WITH SUPPORTING BRIEF AND APPENDIX.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No.

MARY BELL KING, *Petitioner,*

vs.

THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, Mary Bell King, respectfully represents that she is aggrieved by the final judgment and decision of the United States Circuit Court of Appeals for the Fourth Circuit, in an action at law entitled No. 5559, The Order of United Commercial Travelers of America, Appellant, vs. Mary Bell King, Appellee, decided April 9, 1947, and by reason thereof, your Petitioner prays for the allowance of a writ of certiorari to be directed to the United States Circuit Court of Appeals for the Fourth Circuit, in order that the said judgment and decision may be reviewed by your Honorable Court.

I.

Summary Statement of Matter Involved.

This is an action at law, commenced in the Court of Common Pleas, County of Spartanburg, State of South Carolina, in which petitioner, as plaintiff, sought to recover the sum of Five Thousand Dollars ($5,000.00) from respondent, as defendant, a Fraternal Benefit Association, incorporated under the laws of the State of Ohio, upon a policy of insurance issued by it on the life of her husband. By reason of diversity of citizenship and jurisdictional amount, the action was removed by the defendant to the District Court. The case was tried upon an agreed statement of facts by the District Judge, who rendered a decision in favor of the Petitioner for the sum of Five Thousand Dollars ($5,000.00) and interest. (R. 5-20.)

Upon appeal by the Defendant, The Order of United Commercial Travelers of America, to the Circuit Court of Appeals for the Fourth Circuit, that Court, for the reasons stated in its opinion, (R. 24-29), rendered April 9, 1947, reversed the judgment of the lower court. The opinion of the Circuit Court stated that although South Carolina law would be controlling, the highest court in that state has never considered the precise question here involved. (R. 25.)

The Court of Appeals by order of May 10, 1947, stayed its mandate for thirty days (R. 30-31), and thereafter by order until July 10, 1947 (R. 32).

II.

Basis of Jurisdiction of Supreme Court.

Jurisdiction rests upon Section 240-A of the Judicial Code, as amended by Act of Congress of February 13, 1925, 43 Stat. 936, (28 USCA, Sec. 347a), conferring jurisdiction to review any judgment of the Circuit Court of Appeals, and Section 5-b of Rule 38 of the Supreme Court, together with diversity of citizenship and the jurisdictional amount.

III.

Questions Involved.

Has the Circuit Court of Appeals decided an important question of local law in a way probably in conflict with applicable local decisions in that the Court did not follow the South Carolina laws as declared by the Courts of South Carolina within the requirement of Sec. 34 of the Judiciary Act of 1789, 28 USCA Sec. 725 and of the decision in *Erie R. Co. v. Tompkins*, 304 U. S. 64, and subsequent cases decided by the United States Supreme Court extending and broadening the principle laid down by the Erie case.

IV.

Reasons Relied Upon for Allowance of the Writ.

The insurance policy upon which petitioner brought suit is a South Carolina contract, and the case is governed by the laws of the State of South Carolina. The judgment of the Court of Appeals was arrived at contrary to state law and rules of decision of state courts, including a decision (from which no appeal was taken to the State Supreme Court) of the Court of Common Pleas for the County of Spartanburg, South Carolina, which allowed this very same petitioner to recover on a similar policy with another insurance company on the same statement of fact as was before the Circuit Court of Appeals. A copy of this decision appears in the Appendix. Thus, unless reversed, the decision of the Circuit Court of Appeals furnishes insulation and escape to the respondent, who was able to move the original case against it from the State to the Federal Courts due solely to the circumstance of diversity of citizenship and jurisdictional amount while another insurer, in a case so similar as to be on all fours, which could not move

its case because of insufficient jurisdictional amount is required by a state court to pay.

Respectfully submitted,

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Her Attorney.

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SUPPORTING BRIEF.

I.

Index to brief is included in index to petition, *supra*.

II.

The Opinions of the District Court and Court of Appeals.

The opinion of the District Court was filed May 24, 1946, and reported in 65 Fed. Sup. 740.

The opinion of the Circuit Court of Appeals was filed April 9, 1947, and reported in 161 F. 2d 108.

III.

Grounds On Which Supreme Court Jurisdiction is Invoked.

This application is made upon authority of Section 240-a of the Judicial Code as amended by the Act of Congress of February 13, 1925, 43 Stat. 936 (28 USCA, Sec. 347a), and Section 5-b of Rule 38 of this Court, together with diversity of citizenship and jurisdictional amount.

IV.

Statement of Case.

This is an action by petitioner, as beneficiary, to recover on an insurance contract agreeing to pay beneficiary Five Thousand Dollars ($5,000.00) in the event of the death of Drew L. King, her husband, effected solely through external, violent and accidental means. An exclusion clause in the insurance policy provided that "this Order shall not be liable to any person for any benefit for death resulting for participation, as a passenger or otherwise, in aviation or aeronautics."

On February 9, 1943, Drew L. King, the deceased, a Second Lieutenant in the Civil Air Patrol with Coastal Patrol No. 8, was stationed at James Island near Charleston, South Carolina. On the morning of February 9, 1943,

at around 8 A. M. he left his base field as an observer in a land based plane piloted by a First Lieutenant, Clarence Rawls, on a routine coastal patrol flight. Included in the patrol was a second plane piloted by Lieutenant James A. Taylor with Lieutenant K. C. Bates as Observer. All of the above parties were members of the Civil Air Patrol.

About 9:30 A. M. the plane occupied by Rawls and King developed motor trouble and was forced down on the Atlantic Ocean at about thirty miles out from Cape Fear, North Carolina.

At around 9:33 A. M. Taylor and Bates observed the plane on the water, where it had apparently landed in a normal landing attitude. Both Rawls and King were out of the plane and in the water wearing inflated life jackets and neither seemed to Taylor or Bates to have been injured from the landing. Taylor and Bates circled them at an altitude of about fifty feet and could see both men signalling with their arms. They dropped them emergency kits containing whiskey and concentrates and radioed their situation and position to the base. The plane sank within about four minutes after being first observed on the water. Taylor and Bates went up to an altitude of about 500 to 600 feet so that they could keep King and Rawls in sight and continued to circle them for a period of two to two and one-half hours when a shortage of gasoline forced them to head for their base. During this period King was alive.

The two men were picked up by a Navy boat about 2 P. M. both being dead at the time. The bodies were examined by Lieutenant Com. Landis C. Brown (a duly licensed and practicing physician in civil life) of the United States Navy at the Section Base Hospital of Fort Caswell at Southport, North Carolina. He found one or two slight scratches on Lieutenant King's body but found no marks severe enough to be called an injury or considered

a contributory cause of death. His diagnosis as shown in the proof of death furnished by plaintiff to defendant, was "Drowning as a result of exposure in the water after failure of airplane motor." Lt. Com. Brown was not an eyewitness to events leading to the death of King.

Under agreed facts (R. 1-4) and applicable law, the District Court resolved the single issue presented by the case against the respondent by concluding that the proximate cause of the death of the insured was accidental drowning within the terms of the policy; and that his death did not result from participation, as a passenger or otherwise, in aviation or aeronautics, within the meaning of the exclusion provisions of the policy. (R. 20.)

The Circuit Court of Appeals was unable to see how, under the agreed facts, death resulted in any way other than from participation in aviation, and reversed the judgment of the lower court. (R. 26.)

V.

Specification of Errors.

In reversing the judgment of the District Court it is respectfully urged:

1. The Circuit Court of Appeals erred in that it failed and refused to follow state law and rules of decisions of courts of the State of South Carolina; it being undisputed that the insurance certificate involved in this controversy is a South Carolina contract governed and solvable by the laws of South Carolina.

2. The Circuit Court of Appeals erred in refusing to follow a decision of the South Carolina Court of Common Pleas which allowed this very same petitioner, as plaintiff, to recover on a similar policy with another insurance company on the same statement of facts as here involved; this decision being the only one in which any South Carolina Court has passed upon the precise question here involved.

VI.

ARGUMENT.

Specification No. 1.

Under the doctrine of the *Erie Railroad Company vs. Tompkins,* 304 U. S. 64, 78, the law to be applied in this case is the law of the State of South Carolina and it is not a matter of Federal concern whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision. The rules of decision established by judicial decisions of State Courts, as well as those prescribed by statute, are "laws" which, by Sec. 34 of the Judiciary Act of 1789, 1 Stat. at L. 92, Chap. 20, 28 U.S.C.A., Sec. 725, are made "the rules of decision in trials at common law."

In *Bolt v. Life and Casualty Inc. Co.,* 156 S. C. 117, 152 S. E. 766, the defendant claimed that the deceased having been killed while riding a motorcycle, was not covered by a policy which insured against collision of or by any accident to a motor-driven car; the contention of the defendant being that a motorcycle is not a motor-driven car. Mr. Justice Cothran in a dissenting opinion, 152 S. E. 770, stated that in every case he had been able to find, the precise question at issue was decided in favor of the contention of the insurance company that the descriptive term "motor-driven car" did not cover a motorcycle. To this effect he found and cited cases from Massachusetts, Louisiana, New Jersey, New York and North Carolina. The precise question involved was entirely new in South Carolina and the majority of the court (all the other four members) found against the contention of the insurance company, contrary to the overwhelming weight of authority elsewhere.

Commenting on the question as a novel one, Mr. Justice Blease (152 S. E. 767) stated that in considering it, there

are some principles of law, well recognized by our court, which must be kept in mind. In this connection he said:

"An examination of many of our decisions, too numerous to ever refer to here, will disclose that our court has made it the almost universal rule to construe any clause of an insurance policy against the insurer, when there existed the least doubt as to the meaning of the language employed."

In this statement, referred to by the Circuit Court (R. 28) as a "generalized dictum," we think the Supreme Court of South Carolina was announcing a rule of decision established by its judicial decisions, which should have been followed by the Circuit Court. The Circuit Court indicates that its adoption of this rule of decision would have led it to an opposite result to the one reached. Referring to the quoted statement, the Circuit Court said:

"In any event, we believe that the highest court in South Carolina would not make specific application of such a generalized dictum, which, if applied to the facts here, would fly in the face of reason and the very considerable authority that has expressed the view we now follow." (R. 28.)

We cannot discover that any of the "very considerable authority" referred to comes from the courts of South Carolina.

Specification No. 2.

On July 29, 1946, a Court of Common Pleas of South Carolina rendered a decision in the case of *Mary Bell King vs. Commonwealth Life Insurance Company of Louisville, Kentucky,* as evidenced by Judgment Roll Number 33454, Office of the Clerk of Court of Common Pleas of Spartanburg County, South Carolina. This was a case by this petitioner, as plaintiff, involving the death of the same insured as here and was upon a certificate of insurance

promising to pay the plaintiff $2,500.00 upon receipt of proofs of the death of the insured. The exclusion clause of the policy in the Commonwealth case excluded benefits if "the death of the insured resulted from operating or riding in any kind of aircraft * * *" The issues were tried without a jury before Circuit Judge T. S. Sease upon agreed facts, of necessity materially the same as here, and resulted in a decree awarding judgment to the plaintiff from which no appeal to the Supreme Court of South Carolina was taken by the defendant. Copies of this decision were furnished the Circuit Court and it appears in the appendix hereto.

Article 5, Section 15, of the South Carolina Constitution of 1895 provides: "The Courts of Common Pleas shall have * * * jurisdiction in all civil cases. They shall have appellate jurisdiction in all cases within the jurisdiction of inferior Courts, except from such inferior Courts from which the General Assembly shall provide an appeal directly to the Supreme Court." If the amount involved in the King vs. Commonwealth Life case, supra, had been less than One Hundred Dollars ($100.00), it could have been tried in a South Carolina Magistrate Court under the provisions of Section 257, South Carolina Code of Laws, 1942, which reads as follows: "Magistrates shall have civil jurisdiction in the following actions: (1) In actions arising on contracts for the recovery of money only, if the sum claimed does not exceed one hundred dollars." If so tried, the Court of Common Pleas would have had appellate jurisdiction under Section 794, South Carolina Code of Laws, 1942, which is as follows: "When a judgment is rendered by a magistrate's court, * * * the appeal shall be to the circuit court of the county wherein the judgment was rendered * * *" The Court of Common Pleas is a circuit court as provided by Article 5, Section 1 of the

South Carolina Constitution of 1895, which reads as follows: "The judicial power of this State shall be vested in a Supreme Court, in two Circuit Courts, to wit: A Court of Common Pleas having civil jurisdiction and a Court of General Sessions with criminal jurisdiction only * * *"

The Circuit Court of Appeals, referring to the opinion of the Court of Common Pleas in King v. Commonwealth, supra, stated, "That opinion, not binding on other South Carolina courts, is not binding on us and we cannot treat it as a final expression of South Carolina law," citing *Erie Railroad vs. Tompkins*, 304 U. S. 64. (R. 29.)

This leads us to a brief reference to decisions broadening the doctrine announced in Erie Railroad, *supra*. In *West v. American Teleph. and Teleg. Co.*, 311 U. S. 223, 231, the Court said:

"The Circuit Court of Appeals in this case, in which jurisdiction rests exclusively on diversity of citizenship, declined to follow the ruling in *West v. American Teleph. and Teleg. Co.*, 54 Ohio App. 369, 7 N. E. (2d) 805, 7 Ohio Ops. 363, of the Cuyahoga County Court of Appeals, an intermediate appellate court of Ohio. The question for decision is whether, in refusing to follow the rule of law announced by the state court, the court below failed to apply state law within the requirement of Section 34 of the Judiciary Act of (September 24) 1789, 1 Stat. at L. 92, Chap. 20, 28 USCA Section 725 and of our decision in the *Erie R. Co. v. Tompkins*, 304 U. S. 64, 82 L ed 1188, 58 S. Ct. 817, 114 A. R. L. 1487."

The Court then broadens the doctrine of the Erie Railroad Case, *supra*, by stating, (311 U. S. 236)

"True, as was intimated in the Erie R. Co. Case, the highest court of the state is the final arbiter of what is state law. When it has spoken, its pronouncement is to be accepted by federal courts as defining state law unless it has

later given clear and persuasive indication that its pronouncement will be modified, limited or restricted. See *Wichita Royalty Co. v. City Nat. Bank*, 306 U. S. 103, 107, 83, L ed 515, 517, 59 S. Ct. 420. But the obvious purpose of Section 34 of the Judiciary Act is to avoid the maintenance within a state of two divergent or conflicting systems of law, one to be applied in the state courts, the other to be availed of in the federal courts, only in case of diversity of citizenship. That object would be thwarted if the federal courts were free to choose their own rules of decision whenever the highest court of the state has not spoken.

"A state is not without law save as its highest court has declared it. There are many rules of decision commonly accepted and acted upon by the bar and inferior courts which are nevertheless laws of the state although the highest court of the state has never passed upon them. In those circumstances a federal court is not free to reject the state rule merely because it has not received the sanction of the highest state court, even though it thinks the rule is unsound in principle or that another is preferable."

We cannot better stress our opinion that the Circuit Court of Appeals should have followed the King vs. Commonwealth Life case, *supra*, as decided by the Court of Common Pleas, than by quoting the following from *Fidelity Union Trust Co. vs. Field*, 311 U. S. 169, 177, 178, where there was under review a decision of the United States Circuit Court of Appeals for the Third Circuit which had declined to follow decisions of the Chancery Court of New Jersey:

"The Circuit Court of Appeals found it impossible to distinguish the facts in the two Chancery cases from those shown here. The court recognized its duty to follow the law of the State and said that where that law had been

determined by the state court of last resort, its decision must be followed irrespective of the federal court's opinion of what the law ought to be. But the majority of the Circuit Court of Appeals took the view that it was not so bound 'by the pronouncements of other state courts' but might conclude that 'the decision does not truly express the state law.' The court held that the statute of 1932 was 'clearly constitutional and unambiguous' and that 'contrary decisions' of the Chancery Court of New Jersey were not binding. Accordingly, the judgment of the District Court was reversed.

"We think that this ruling was erroneous. The highest state court is the final authority on state law (*Beals v. Hale*, 4 How. (U.S.) 37, 54, 11 L ed 865, 872; *Erie R. Co. v. Tompkins*, 304 U. S. 64, 78, 82 L ed 1188, 1194, 58 S. Ct. 817, 114 A. L. R. 1487), but it is still the duty of the federal courts, where the state law supplies the rule of decision, to ascertain and apply that law even though it has not been expounded by the highest court of the State. See *Ruhlin v. New York L. Ins. Co.* 304 U. S. 202, 209, 82 L ed 1290, 58 L ed 860. An intermediate state court in declaring and applying the state law is acting as an organ of the state and its determination, in the absence of more convincing evidence of what the state law is, should be followed by a federal court in deciding a state question. We have declared that principle in *West v. American Teleph. and Teleg. Co.* Nos. 44 and 45, decided this day (311 U. S. 223, post, 139, 61 S. Ct. 179, 132 A. L. R. 956). It is true that in that case an intermediate appellate court of the State had determined the immediate question as between the same parties in a prior suit, and the highest state court had refused to review the lower court's decision, but we set forth the broader principle as applicable to the decision of an intermediate court, in the absence of a decision by the

highest court, whether the question is one of statute or common law." In the Field case, the Court also said: (311 U. S. 178, 179) "At the present time the Thatcher and Travers cases stand as the only exposition of the law of the State with respect to the construction and effect of the statutes of 1932, and the Circuit Court of Appeals was not at liberty to reject these decisions merely because it did not agree with their reasoning."

At the present time, the case of King vs. Commonwealth Insurance Company, *supra*, stands as the only exposition of the law of the State of South Carolina upon the precise question here involved; that is, with respect to the construction and effect of an exclusion clause such as is presently involved as applied to the presently involved facts. The Court of Common Pleas was in complete accord with the able and exhaustive opinion of the District Court in the case here under consideration. The opinion of the Court of Common Pleas (p. 23, post), says: "The District Court held that the death of the insured did not result from participation, as a passenger or otherwise, in aviation or aeronautics, within the meaning of the exclusion provision of the policy and that plaintiff was entitled to recover. I am in agreement with this opinion." Using the exact wording of the District Court opinion, Court of Common Please (p. 24, post) further said: "To bar recovery by the plaintiff in this case, it would be necessary to write some other wording into the exclusion clause involved, which was not written there by the defendant when its policy was issued to Drew L. King.

This very pertinent statement appears in *Fidelity Union Trust Company vs. Field*, 311 U. S. 169, 180, "It is inadmissible that there should be one rule of state law for litigants in the state courts and another rule for litigants who bring the same question before the federal courts owing to the

circumstance of diversity of citizenship." Unless the judgment of the United States Circuit Court of Appeals for the Fourth District is reversed, that which was above said to be inadmissible will obtain.

Respectfully submitted,

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APPENDIX.

Copy of Decree of Court of Common Pleas Recorded in Office of Clerk of Court for Spartanburg County, South Carolina. Judgment Roll No. 33454.

The defendant in this action is a corporation organized under the laws of one of the States of the Union, and authorized to engage in, and being engaged in the life insurance business in the State of South Carolina. The plaintiff is the beneficiary of an insurance contract entered into by the defendant with the plaintiff's late husband, Drew L. King. Application for the issuance of the insurance policy involved was made at Spartanburg, South Carolina, by the insured and the policy was issued to him there on December 3rd, 1940, and the first semi-annual premium was paid by him at the same time and place. By the terms of its contract as evidenced by its policy of insurance No. 247015, the defendant promised to pay to this plaintiff immediately upon receipt of proofs of the death of the insured the sum of Two Thousand Five Hundred ($2,500.00) Dollars.

Upon agreement by counsel representing the parties, this case was tried before me at the May, 1946, term of the Court of Common Pleas for the County of Spartanburg. The facts were stipulated by the parties, and are as follows:

1. That policy of Defendant, No. 247015, is attached and made "Plaintiff's Exhibit No. 1." The issuance and delivery of same are admitted. The policy was in full force and effect and all premiums paid on the date of the death of the name insured, Drew Lagrone King. The face amount of the policy is Two Thousand Five Hundred and no/100 ($2,500.00) Dollars, with no double indemnity benefits, and the beneficiary named in said policy is the Plaintiff in this action, and a resident of Spartanburg County, South

Carolina. That the Defendant has paid to Plaintiff the reserve value of the policy, which defendant alleges is the only amount due thereunder, without prejudice, however, to Plaintiff's claim for the face amount of the policy.

2. That the policy contained, inter alia, the following provision:

> "This Policy is issued under the express condition that should the death of the Insured result from operating or riding in any kind of aircraft, except as a fare-paying passenger in a licensed passenger aircraft operated by a licensed pilot on a regular passenger route between definitely established airports, the Company's liability hereunder shall be limited, during the first two Policy years, to the return of the premiums which have been received hereunder, without interest, to the Beneficiary, and in the event of such death after the second Policy year, the Company's liability hereunder shall be limited to the reserve value of the policy."

3. The insured died on the 9th day of February, 1943.

4. That at the time of his death and for some time prior thereto, insured was a member of the Civil Air Patrol. The Civil Air Patrol was a branch of and operated under the Office of Civilian Defense. Members of the Civil Air Patrol were paid from funds allocated to the Office of Civilian Defense and could voluntarily resign from such service. Members of the Civil Air Patrol were not eligible for National Service Life Insurance or for benefits provided under the G. I. Bill of Rights. On the morning of February 9, 1943, King left the Charleston Air Base as an observer on a plane piloted by one Rawls, for a routine C. A. P. mission. He was not a fare-paying passenger and the plane was not licensed as a passenger aircraft and was not being operated on a regular passenger route between definitely established airports. The aircraft was a Stinson NC 39429, and was not owned by the United States Gov-

ernment, and was neither designed nor built to take off or land on water. Included in the patrol was a second plane piloted by Lieutenant J. A. Taylor with Lieutenant K. C. Bates as an observer, both of whom were members of the C. A. P.

5. The facts and circumstances surrounding the death of the insured are as follows:

On February 9, 1943, the deceased, a Second Lieutenant in the Civil Air Patrol with Coastal Patrol No. 8 was stationed at James Island near Charleston, South Carolina. On the morning of February 9, 1943, at around 8 A. M. he left his base field as an observer in a plane piloted by a First Lieutenant, Clarence Rawls, on a routine coastal patrol flight. Included in the patrol was a second plane piloted by Lieutenant James A. Taylor, with Lieutenant K. C. Bates as observer.

About 9:30 A. M., the plane occupied by Rawls and King developed motor trouble and was forced down on the Atlantic Ocean at about thirty miles out from Cape Fear, North Carolina.

At around 9:33 A. M., Taylor and Bates observed the plane, which had landed in a normal landing attitude, on the water. The water was very cold at the time and so was the air above it. Both Rawls and King were out of the plane and in the water wearing inflated life jackets and neither seem to Taylor or Bates to have been injured from the landing. Taylor and Bates circled them at an altitude of about fifty feet and could see both men signalling with their arms. They dropped them emergency kits containing whiskey and concentrates and life saving equipment including inflated rubber tubes and radioed their situation and position to the base. The plane sank within about four minutes after being first observed on the water. Taylor and Bates went up to an altitude of about 500 to 600 feet

so that they could keep King and Rawls in sight, and continued to circle them for a period of two to two and one-half hours when a shortage of gasoline forced them to head for their base. During this period King was alive. Immediately after King's plane was forced down on the water a radio alarm was sent out and seventeen Army, Navy and C. A. P. planes, one blimp, two flying boats, and fourteen surface boats were sent out in search for him. Before Taylor and Bates left the scene, Naval search planes flew over the place where King and Rawls were on the water, but apparently failed to see them.

The two men were picked up by a Navy boat about 2 P. M., both being dead at the time. The bodies were examined by Lieutenant Com. Landis C. Brown (a duly licensed and practicing physician in civil life) of the United States Navy at the Section Base Hospital of Fort Caswell at Southport, North Carolina. He found one or two slight scratches on Lieutenant King's body, but found no marks severe enough to be called an injury or considered a contributory cause of death. His diagnosis was "Drowning as a result of exposure in the water." Lt. Com. Brown was not an eyewitness to events leading to the death of King.

6. Final proofs of death were duly submitted to the defendant on the 31st day of March, 1943.

7. If relevant and competent, it is agreed that during prior service as a member of the C. A. P., Lieutenant King had been forced down on the water and remained in the water for a period of five hours prior to his rescue.

Under the agreed facts and applicable law, did the death of the insured result from engaging as a passenger or otherwise in submarine or aeronautic operation?

It has been decided in South Carolina, that cause of death, within the meaning of insurance against death re-

sulting from external, violent and accidental means, is the immediate cause, and not the remote cause *Goethe v. New York Life Ins. Co.*, 183 S. C. 199, 190 S. E. 451. In that case, Goethe died of a heatstroke, following vigorous efforts to put out a fire. On the issue of whether death was the culmination of angina pectoris, a disease, or heatstroke, an accident, the Supreme Court of South Carolina said: "In our opinion, the heatstroke suffered by the insured in the case at bar was in and of itself an accidental means, * * *"

In *Manufacturers' Accident Indemnity Co. v. Dorgan*, (C. C. A. 6) 58 Fed. 945, the deceased, (husband of the plaintiff in that case) was last seen alive fishing in a brook. Twenty minutes later, he was discovered lying in the brook, with his face downward, and submerged in six inches of water, dead. The defendant insurance company contended, and evidence was introduced by it, tending to show that the deceased had suffered from defective action of the heart in its aortic valve. The jury found adversely to defendant's contention, and rendered a verdict for the plaintiff. In affirming the judgment of the district court, Judge Taft said: "The policy provided, as we have already seen, that the benefits under it extended to the death of the insured through external, violent, and accidental means, and that it should not cover accidental injuries or death resulting from or caused, directly or indirectly, wholly or in part, by or in consequence of fits, vertigo, somnambulism, or any disease existing prior or subsequent to the date of the certificate, or to any cause excepting where the injury was the sole cause of the disability or death. In the application the deceased stated that he was aware that the insurance would not extend to any bodily injury happening, directly or indirectly, in consequence of disease, or to death or disability caused wholly or in part by bodily in-

firmities or disease, or to any case where the accidental injury was not the proximate and sole cause of disability or death."

"It is well settled that an involuntary death by drowning is a death by external, violent, and accidental means. *Trew v. Assurance Company*, 6 Hurl & N. 838; *Winspear v. Insurance Co.*, 7 Q. B. Div. 42; *Reynolds v. Insurance Co.*, 22 Law T. (N. S.) 820.

"We are of the opinion that in the legal sense, and within the meaning of the last clause, *if the deceased suffered death by drowning, no matter what was the cause of his falling into the water, whether disease or a slipping, the drowning, in such case, would be the proximate and sole cause of the disability or death, unless it appeared that death would have been the result, even had there been no water at hand to fall into.* The disease would be but the condition; the drowning would be the moving, sole, and proximate cause.

In the case of *Tierney v. Occidental Life Ins. Co.*, 89 Cal. App. 779, 265 P. 400, there was for construction by the court an exclusion clause reading: "This policy does not cover any injury * * * sustained * * * while participating or in consequence of having participated in aeronautics." In construing the words "in consequence," the court distinguished between "sequence" and "in consequence." The court held that recovery upon an insurance contract might be had by the beneficiary of an insured who was killed by stepping into a whirling airplane propeller after, having been a passenger on an airplane, he had climbed from the plane to the ground. I quote excerpts from the opinion in which that court asked and answered some very pertinent questions. The court said: "Was the death caused 'in consequence of the insured's having participated in aeronautics?' He had so participated and he met his death. Was

the death caused in consequence thereof? The death was a sequence of the participation, that is, it followed closely and was connected therewith, but was it in consequence thereof? Did the participation cause the death? . . . Did the accident happen as the result of or because of that which is now past, 'having participated in aeronautics?' Did the participation cause the death?" The court not only asked all of the above questions but in construing the meaning of the exclusion clause answered all of these questions in favor of the insured and against the insurer, and in the course of the opinion said: "At first blush, the flight and the accident being so close together, one is apt to confuse the meaning of 'sequence' and 'in consequence'."

The case of *Mary Bell King v. The Order of United Commercial Travelers of America,*——Federal Supplement——, was a case by this same plaintiff involving the death of the same insured as here, and was upon a certificate of insurance promising to pay the beneficiary the sum of Five Thousand Dollars ($5,000.00) upon receipt of due proof of the death of the insured effected solely through external, violent, and accidental means, but excepted the risk of death resulting from participation as a passenger or otherwise in aviation or aeronautics. The District Court held that the death of the insured did not result from participation, as a passenger or otherwise, in aviation or aeronautics, within the meaning of the exclusive provision of the policy and that plaintiff was entitled to recover. I am in agreement with this opinion. In the case before me, it appears that Lieutenant King arrived by way of aircraft at the place where he was later accidentally drowned, but he was not injured in the arrival or in leaving the plane which had brought him there. He left the plane uninjured and wearing an inflated life jacket. The plane had not crashed, but had landed on the water in a normal landing

attitude and sank within a few minutes after its landing. At the time the plane sank, King was alive and uninjured and had the protection of an inflated life jacket, which he was wearing. He was known to have been alive for a period of two and one-half hours thereafter when shortage of gasoline in another plane piloted by a Lieutenant Taylor, who had kept King in sight, forced Taylor to return to his base.

To bar recovery by the plaintiff in this case, it would be necessary to write some other wording into the exclusion clause involved, which was not written there by the defendant when its policy was issued to Drew L. King. I conclude that disengagement from participation in aviation or aeronautics had taken place, and that King's service, travel and flight in the aircraft had definitely ended more than two hours after his death. The only connection King had with the plane at the time he met his death by drowning was that he had arrived by plane at a place near where he was drowned. His death was the result of accidental drowning.

It Is Therefore Ordered, Adjudged and Decreed that the plaintiff have judgment against the defendant in the sum of Two Thousand Five Hundred ($2,500.00) Dollars with interest at six per cent (6%) from the thirty-first day of March, 1943, which judgment shall be credited with the amount already paid to plaintiff as the reserve value of the policy, with interest from date of payment.

T. S. Sease,
Judge of Seventh Judicial Circuit.

July 29, 1946.